**PP**

**v.**

**MOHD ZULAZRI MINHAT**

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CRIMINAL TRIAL NO: MT1-41-11-2004]
19 OCTOBER 2006

***CRIMINAL PROCEDURE:*** *Appeal - Acquittal, against - Finding of facts - Identity of accused - Issue of mistaken identity - Whether put to prosecution witnesses by way of cross examination - Whether there was rebuttal on part of the accused - Whether magistrate's finding that accused had not been identified wrong - Whether justified appellate interference*

This was an appeal by the prosecution against the decision of the learned magistrate who acquitted and discharged the accused at the close of the defence case. The charge against the accused was that he, being the rider of motorcycle MAS 9451 did ride the said vehicle on the road in a manner which was dangerous to other road users, thereby committing an offense punishable under s. 42(1) of the Road Transport Act 1987. After evaluating the evidence of all the prosecution witnesses at the close of the prosecution's case, the learned magistrate found that the prosecution had established a *prima facie* case for the accused to answer. The identity of the accused had neither been challenged nor disputed by the defence at the close of the prosecution's case. At the close of the defence case, the evidence was clear that the act of dangerous riding had been proved beyond reasonable doubt. However, the learned magistrate was doubtful of the identity of the accused and subsequently acquitted and discharged the accused. The sole question for determination in the instant appeal was whether on the evidence the court had arrived at a correct finding in relation to the identity of the accused.

**Held (allowing the appeal, setting aside the order of acquittal and discharge):**

**(1)** The evidence of SP1 who was on traffic duty at the scene, had given direct evidence that a group of three to four motorcyclists were engaged in an illegal racing at the time and place stated in the charge. He saw the accused as one of the illegal racers riding a motorcycle dangerously. SP1 gave chase,

which the accused had ignored until SP1 finally caught up with the accused and detained him. In his first information report, SP1 had categorically stated that the accused was the rider of the motorcycle bearing registration MAS 9451. That report provided strong corroborative evidence of SP1's testimony. If the accused had been wrongly or mistakenly identified by SP1, then the defence would have put this issue to SP1 by way of cross examination. However, this issue of wrong or mistaken identity had never been put to any of the prosecution witnesses by way of cross examination but was raised in the defence for the first time, which would classify as a recent invention. (paras 8, 9 & 11)

**(2)** The accused did not appear to have rebutted the fact that he was one of the racers in the illegal racing. The participation of other racers in the group did not *ipso facto* throw any doubt in the evidence of SP1 who gave chase and arrested the accused in the act of driving dangerously. In the instant appeal, the learned magistrate's finding that the accused had not been identified was plainly wrong, being against the weight of the evidence and that would justify appellate interference. (paras 13 & 15)

*[Pursuant to s. 261 of the Criminal Procedure Code, this case be remitted to the succeeding magistrate to mete out the sentence only after hearing submissions by the prosecution and defence; bail for the accused hereby extended.]*

**Case(s) referred to:**
*Balachandran v. PP [2005] 1 CLJ 85 FC* ***(refd)***
*Karthiyayani & Anor v. Lee Leong Sin & Anor [1975] 1 MLJ 119 FC* ***(refd)***
*Kesavan Senderan v. PP [1999] 1 CLJ 343 HC* ***(refd)***
*PP v. Abdul Rahman Mohamad [2005] 1 CLJ 700 CA* ***(refd)***
*PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, s. 261
Road Transport Act 1987, s. 42(1)

*For the accused - CS Chin; M/s Chin & Yau*
*For the prosecution - Roziza Sidek*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Low Hop Bing J:**

### Appeal

**[1]** This is an appeal by the prosecution against the decision of the learned magistrate who had on 13 July 2004 acquitted and discharged the accused at the close of the defence case.

### The Charge

**[2]** The charge against the accused reads:

> Bahawa kamu pada 15.9.2002 jam lebih kurang 1.45 pagi di lampu isyarat Air Keroh Height di dalam daerah Melaka Tengah dalam negeri Melaka sebagai penunggang motosikal MAS 9451 telah menunggang kenderaan tersebut di atas jalanraya dengan keadaan yang boleh membahayakan kepada pengguna-pengguna jalan yang lain dengan ini kamu telah melakukan satu kesalahan dan boleh dihukum di bawah Sek 42(1) Akta Pengangkutan Jalan 1987.

[My translation:

That you on 15 September 2002 at about 1.45am at the traffic light of Air Keroh Height in the district of Melaka Tengah in the state of Melaka being the rider of motorcycle MAS 9451 did ride the said vehicle on the road in a manner which is dangerous to other road users and that you have thereby committed an offence punishable under s. 42(1) of the Road Transport Act 1987.]

### Identity Of Accused

**[3]** After evaluating the evidence of all the prosecution witnesses, at the close of the prosecution's case, the learned magistrate found that the prosecution had established a *prima facie* case for the accused to answer. The identity of the accused has neither been challenged nor disputed by the defence at the close of the prosecution's case.

**[4]** At the close of the defence case, the evidence was clear that the act of dangerous riding had been proved beyond reasonable doubt. However, the learned magistrate said that he was subsequently doubtful of the identity of the accused. He then acquitted and discharged the accused.

**[5]** In the circumstances, the sole question for determination in the instant appeal is whether on the evidence the court below has arrived at a correct finding in relation to the identity of the accused.

**[6]** It was submitted by learned deputy public prosecutor Miss Roziza bt Sidek that the learned magistrate has erred in the above finding.

**[7]** Learned defence counsel Mr. CS Chin responded that the learned magistrate's finding was justified.

**[8]** It is to be noted that the evidence of SP1, lance corporal Mohd Yunus, who was on traffic duty at the scene, had given direct evidence that a group of three to four motorcyclists were engaged in an illegal racing at the time and place stated in the charge. He saw the accused as one of the illegal racers riding a motorcycle dangerously. SP1 gave chase, which the accused had ignored until SP1 finally caught up with the accused and detained him.

**[9]** In his first information report, SP1 has categorically stated that the accused was the rider of the motorcycle bearing registration No. MAS 9451 which was a pinkish Yamaha 125Z. That report provides strong corroborative evidence of SP1's testimony: see s. 157 Evidence Act 1950, as explained by Raja Azlan Shah FJ (now HRH the Sultan of Perak) in *Karthiyayani & Anor. v. Lee Leong Sin & Anor.* [1975] 1 MLJ 119 FC at p. 120; Abdul Wahab Patail J in *Kesavan Senderan v. PP* [1999] 1 CLJ 343 HC at p. 360 d-e and Augustine Paul JCA (now FCJ) in *Balachandran v. PP* [2005] 1 CLJ 85 FC at p. 94c.

**[10]** The defence case confirmed that a group of three to four motorcyclists were involved in an illegal racing at the time and place stated in the charge. The defence was that the accused was wrongly or mistakenly identified. The accused said that the motorcyclist who was riding dangerously was the rider of motorcycle bearing registration No. MAS 8243 but not him.

**[11]** If the accused had been wrongly or mistakenly identified by SP1, then the defence would have put this issue to SP1 by way of cross-examination. However, this issue of wrong or mistaken identity had never been put to any of the prosecution witnesses by way of cross-examination, but was raised in the defence for the first time, which I would classify as a recent invention.

**[12]** In this regard, I am reminded of *Public Prosecutor v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC where the relevant portion of the judgment of the Supreme Court was delivered by Edgar Joseph Jr SCJ (as he then was) in the following words:

> ... the defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticized for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention.

**[13]** It is significant to note that the accused does not appear to have rebutted the fact that he was one of the racers in the illegal racing. The participation of other racers in the group does not *ipso facto* throw any doubt in the evidence of SP1 who gave chase and arrested the accused in the act of riding dangerously.

**[14]** While it is true that the appellate court must be and is always slow to disturb the finding or decision of the court below based on credibility of witnesses, the appellate court is entitled to do so when it is convinced that the finding or decision was plainly wrong and against the weight of evidence. This principle has been clearly set out by the Court of Appeal in the judgment delivered by Tengku Baharudin JCA in *PP v. Abdul Rahman Mohamad* [2005] 1 CLJ 700 at p. 707.

**[15]** It seems clear to me that in the instant appeal, the learned magistrate's finding that the accused has not been identified is plainly wrong, being against the weight of evidence, and that would justify appellate interference.

## Conclusion

**[16]** On the foregoing grounds, I allow this appeal, set aside the order of acquittal and discharge and substitute it with an order that the accused be found guilty and convicted of the offence as charged.

**[17]** As the learned trial magistrate is no longer exercising jurisdiction as a magistrate in the state of Melaka, and the subsequent proceeding involves merely the sentence to be meted out, pursuant to s. 261 of the Criminal Procedure Code, I order that this case be remitted to the succeeding magistrate for mention today and to mete out the sentence only after hearing submissions by the prosecution and the defence.

**[18]** The bail for the accused is hereby extended.